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ART. VI.—*Report of the case of the Trustees of Dartmouth College against William H. Woodward, argued and determined in the Superior Court of Judicature of the State of New Hampshire, November* 1817: *and on Error, in the Supreme Court of the United States,* 1819. *By Timothy Farrar, Counsellor at Law. Portsmouth, N. H. Published by John W. Foster and West, Richardson and Lord, Boston.* J. J. Williams, printer, Exeter.

*Reports of cases argued and adjudged in the Supreme Court of the United States, February Term,* 1819. *By Henry Wheaton, Counsellor at Law, vol. IV.* New York, published by R. Donaldson, No. 45 John street, 1819.

PERHAPS no judicial preceedings in this country, ever involved more important consequences, or excited a deeper interest in the public mind, than the case of Dartmouth College, recently determined in the Supreme Court of the United States. While the cause was pending, there was much anxiety felt for its final result by the friends of our literary institutions; for it was early perceived, that they stood on no surer foundation than Dartmouth College. Upon the principles, which should be decided to rule this case, they must all stand or fall. The questions involved in it, were in a great measure new, no controversy of the kind having arisen since the year 1763, when the assembly of Connecticut made a similar attempt upon the charter of Yale College, and of this there was no remembrance or record. The cause of the college was indeed committed to able hands, and the report of the case bears ample testimony to the learning and ability which sustained it. The trustees of the college too, are entitled to all praise for their resolution and perseverance, under many discouragements. They have encountered the difficulties and expenses of a protracted law suit, in maintaining their chartered rights; and they have their reward in the approbation of wise and good men. They may now look back upon the past with the consciousness of having discharged faithfully and successfully an important duty to their college, and to the interests of learning. We have thought, that we could not render a more acceptable service to the cause of learning in this country, than by exhibiting an outline of this important case, shewing concisely, but we hope intelligibly, the course

of argument pursued, and the final judgment of the court, upon the points made in the cause.

The action was Trover, brought by the trustees of Dartmouth College against William H. Woodward, for the books of record, charter, common seal, and books of account, alleged to be the property of the plaintiff's, &c. and at the May Term, 1817, was entered at the Superior Court of New Hampshire. The facts in the case were then agreed upon by the parties, and drawn up in the form of a special verdict, setting forth the original charter granted to Dr. Eleazer Wheelock, A. D. 1769, the several acts passed by the legislature of N. Hampshire, on the 27th June A. D. 1816, the 18th December A. D. 1816, and the 26th December A. D. 1816: the refusal of the trustees, to accept the provisions of these acts, the demand made by them, upon the defendant for the property mentioned, the removal of said Woodward, from the offices of Secretary and Treasurer, by the trustees on the 27th August 1816, and his subsequent appointment to the same offices, by the trustees of the Dartmouth University, organized on the 4th of February A. D. 1817, pursuant to the said acts of the Legislature. Under colour of these acts, the defendant claimed to hold the property in dispute; and the general question was, whether these acts were obligatory and binding on the plaintiffs without their assent or acceptance.

The case was argued before the Superior Court of New Hampshire, by Mr. Mason, Mr. Smith, and Mr. Webster, for the plaintiffs, and by Mr. Sullivan and Mr. Bartlett for the defendant. In this court, judgment was rendered for the defendant, and the cause was duly removed by a writ of error to the Supreme Court of the United States; where it was argued by Mr. Webster and Mr. Hopkinson for the plaintiffs, and by Mr. Holmes and Mr. Wirt, the attorney general, for the defendant.

Before the Superior Court of New Hampshire, Mr. Mason maintained that the several acts of the legislature were not obligatory on the plaintiffs; first, because they were not within the scope of legislative power; second, because they violated certain provisions of the constitution of New Hampshire; and third, because they violated the constitution of the United States. The two last of these propositions were also maintained by Mr. Smith and Mr. Webster.

Upon the argument of the case before the Supreme Court

of the United States, Mr. Webster contended for the plaintiffs, that the acts in question were not valid and binding on them without their assent; first, because they were against common right and the constitution of New Hampshire; second, because they were repugnant to the constitution of the United States. But the jurisdiction of the Supreme Court, confining the case within narrower limits, the questions argued, and finally determined there may be thus stated: first, is the original charter of Dartmouth College, a contract within the prohibitory clause of the constitution of the United States, which declares that no state shall pass any law 'impairing the obligations of contracts;' secondly, if it is, do the legislative acts of New Hampshire of 27th June, &c. impair its obligations.

OF CORPORATIONS.

1st. Publick corporations, are created by the sovereign power of the state, for the purposes of civil government, such as counties, towns, parishes, &c. and as such, are subject to such alterations and arrangement as public convenience requires. A number of persons living within certain local limits are erected into a body politic, for the exercise of their civil and political rights, and the performance of their civil duties; among these are the rights of suffrage, the duty of supporting public instruction in religion and morality, of supporting schools, and of executing the laws for the maintainance of the public police. These corporations are the component parts of the state, erected exclusively for public purposes, and are all governed by the same general laws.

Banks, bridges, turnpikes, canals, &c. are private civil corporations. These can claim and exercise their corporate franchises, against the state, so long as they perform the conditions on which they were granted; and it belongs to the courts of justice to determine when they have been performed or broken.

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms and bounty of the founder, in such manner as he has directed; and in this class are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits.

'In eleemosynary foundations,' says Blackstone, 'such as

colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation, the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other, *fundatio perficiens*, or the dotation of it, in which sense, the first gift of the revenues is the foundation, and he who gives them, is in law the founder; and it is in this last sense, that we generally call a man the founder of a college or hospital. To such foundations, there is attached, as a necessary incident, the right of visitation, which implies a power to correct all abuses, and to compel a faithful execution of the original purposes of the charity.' 'The persons who have this right are,' says Lord Holt, 'the founder and his heirs, unless he has appointed and assigned another person to be visitor. For the founder may, if he please, at the time of the endowment, part with his visitatorial power, and the person to whom it is assigned will in that case, possess it, in exclusion of the founder's heirs. This visitatorial power is therefore an hereditament, founded in property, and valuable in intendment of law; and stands upon the maxim, that he who gives his property, has a right to regulate it in future.'

In the construction of charters, it is a general rule that if the objects of the charity are incorporated, as for instance the master and fellows of a college, or the master and poor of an hospital, the visitatorial power in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees or governors, are incorporated to manage the charity the visitatorial power is deemed to belong to them, in their corporate character.

These corporations, like all others, are subject to the general laws of the land, and although they may forfeit their franchises, by mis user or non user, still they may exercise all the rights conferred by their charters, independent of the crown or state. In order to ascertain to which of these classes the corporation of Dartmouth College belongs, reference must be had to the original charter granted to the Rev. Eleazer Wheelock, A. D. 1769. From this it appears, that about the year 1754, Doctor Wheelock had established a charity school, at his own expense, and on his own estate; that through the assistance of well-disposed persons granted at his solicitation, he had clothed, maintained, and educated

for several years a number of native Indians, and afterwards employed them as missionaries and schoolmasters among the savage tribes. At that time, being the sole dispenser and sole administrator, as well as the legal owner of these funds, he made his will, devising this property in trust, to continue the existence and uses of the school and appointed trustees. In this state of things, he had been invited to fix his school permanently in New Hampshire, and to extend the design of it to the education of the youth of that province; but before he removed his school, or accepted this invitation, which his friends in England had advised him to accept, he applied for a charter, to be granted, not to whomsoever the king or government of the province should please, but to such persons as he named and appointed, viz. the persons whom he had already appointed to be the future trustees of his charity by his will.

The charter proceeds to create such a corporation, and to appoint twelve persons to constitute it, by the name of the Trustees of Dartmouth College, to have perpetual existence as such corporation, and with power to hold and dispose of lands and goods for the use of the college, with all the ordinary powers of corporations. They are, in their discretion, to apply the funds and property of the college, to the support of the president, tutors, ministers, and other officers of the college, and such missionaries and schoolmasters as they may see fit to employ among the Indians. There are to be twelve trustees forever, and *no more;* and they are to have the right of filling vacancies occuring in their own body. The Rev. Mr. Wheelock is declared to be the founder of the college, and is by the charter, appointed first president, with power to appoint a successor by his last will. All proper powers of government, superintendance, and visitation are vested in the trustees. They are to appoint and remove all officers at their discretion; to fix their salaries and assign their duties; and to make all ordinances, orders, and laws for the government of the students.

As monies had been collected in England by an agent of Dr. Wheelock, to aid his charitable views, and had been left in the hands of the Earl of Dartmouth, Baron Smith, Mr. Thornton and other gentlemen there, who were themselves contributors, the president was required to transmit to them annually, for their satisfaction, an account of the progress of the institution, and of the disbursement of the funds.

Thus far, the case proceeds upon admitted facts and principles, and whether upon these, the corporation of Dartmouth College, was public, or private and eleemosynary was the great question debated.

It was contended by the council for the defendant, and so determined by the Superior Court of New Hampshire, that this corporation, being created for the purpose of holding and managing property for the use of the college, and the college being founded, for the purpose of spreading christian knowledge among the savages, and of affording the best means of education in liberal arts and sciences, to their children, as well as to the English youth and any others, which were all matters of public concern, must be considered as a public corporation. It was said that the office of a trustee, was in fact a public trust, as much so as the office of governor or of judge, that the *objects* of a corporation made it either public or private, and that a gift to one created for public purposes, was in reality a gift to the public. Such being the nature of this corporation, it followed of course, that the legislature of the state, having the charge of all public interests, had a right to new model or change it in any way fitted to extend its advantages.

This course of argument was met and replied to, fully and conclusively by each of the counsel for the plaintiff, and by all the judges who delivered opinions. It was admitted, that education was an object of national concern, and a proper subject of legislation; that there might be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, and exclusively amenable to it; but was Dartmouth College such an institution? 'From whence can be derived the idea,' inquires chief justice Marshall, 'that this college has become a public institution, and its trustees public officers, exercising powers conferred, by the public for public objects. Not from the source whence its funds were drawn, for its foundation is purely private, and eleemosynary. Not from the application of those funds, for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government.'

'Doctor Wheelock as the keeper of this charity school, instructing the Indians in the art of reading, and in our holy religion; sustaining them at his own expense and on the vol-

untary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties, which belong to government; nor could the legislature have supposed, that his private funds, or those given by others were subject to legislative management, because they were applied to the purposes of education. Did the subsequent act of the incorporation, then confer any new powers on the government, which it could not rightfully exercise before?

'A corporation,' continues the chief justice, 'is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly or as incidental to its very existence. Among the most important of these are immortality, and if the expression may be allowed individuality, properties, by which a perpetual succession of many persons may be, and are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession, with these qualities and capacities, that corporations were invented and are in use. By these means, a perpetual succession of individuals, are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character, on a natural person. It is no more a state instrument, than a natural person, exercising the same powers would be. If then a natural person, employed by individuals, in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it, that this artificial being, created by law, for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country.'

'The fact then,' says Mr. Justice Story, 'that the charity

is public affords no proof that the corporation is also public; and consequently the argument, so far as it is built on this foundation, falls to the ground. If indeed the argument were correct, it would follow that almost every hospital and college would be a public corporation, a doctrine utterly irreconcileable with the whole current of decisions since the time of Lord Coke.

'When the corporation,' continues the judge, 'is said at the bar to be public, it is not merely meant, that the whole community may be the proper objects of the bounty, but that the government have the sole right as trustees of the public interests, to regulate, control, and direct the corporation, and its funds, and its franchises at its own good will and pleasure. Now such an authority does not exist in the government, except where the corporation is in the strictest sense public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself. If it had been otherwise, courts of law would have been spared many laborious adjudications, in respect to eleemosynary corporations, and the visitatorial powers over them, from the time of Lord Holt down to the present day. Nay more, private trustees for charitable purposes would have been liable to have the property confided to their care, taken away from them, without any assent or default on their part, and the administration submitted not to the control of law and equity, but to the arbitrary discretion of the government. Yet, who ever thought before, that the munificient gifts of private donors for general charity, became instantaneously the property of the government; and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them. If we were to establish such a principle, it would extinguish future eleemosynary endowments; and we should find as little of public policy, as we now find of law to sustain it.'

In every application for a charter of incorporation, the government considers the objects proposed to be effected, their beneficial tendency, and general usefulness, and these constitute the consideration for the grant. All wise governments are desirous of encouraging institutions for the promotion of learning, and are willing to confer on benevolent individuals, those franchises and powers, which enable them to be always

of the same charitable mind, managing and directing their own bounty, as if they were immortal. While exercising the powers given, and acting within their acknowledged limits, they and their representatives, in relation to their franchises and property, are as much within the declared protection of the law, as the rights and interests of any individual are. It is as much a maxim of common sense, as of law, that *cujus est dare, ejus est disponere;* and the will of the donor not of the legislature is to be the rule; until it appears, by judicial process according to the laws of the land, that the franchises have been forfeited. But the Superior Court of New Hampshire, after admitting, that the right of the trustees to manage the affairs of the college is a privilege, thus argue, 'how a privilege can be protected from the operation of the law of the land, by a clause in the constitution, declaring that it shall not be taken away but by the law of the land, is not very easily understood.' We were sorry to see this published in a book, as the reasoning of the highest judicial tribunal of a state; and we shall dismiss it, with a quotation from the concluding remark of Mr. Webster's argument upon the point.

'Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice, would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law, or administer the justice of the country. "Is that the law of the land, said Mr. Burke, upon which if a man go to Westminster Hall, and ask counsel, by what title or tenure he holds his privilege or estate, *according to the law of the land*, he should be told, that the law of the land is not yet known; that no decision or decree has been made in his case; and that when a decree shall be passed, he will then know *what the law of the land is.*" Will this be said to be the law of the land, by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head'

From the preceding examination, it appears that Dartmouth College was, under its original charter, a private eleemosynary corporation, with the usual privileges and franchises of such corporations; and among others, with a legal perpetuity, and was exclusively under the government and control of

twelve trustees, who were to be elected and appointed from time to time, by the existing board, as vacancies, or removals should occur.

Is the charter of Dartmouth College, then, a contract, within the clause of the constitution, prohibiting the States from passing any laws impairing the obligation of contracts? In the case of Fletcher *vs.* Peck, the Supreme Court laid down its exposition of the word 'contract,' in the following manner, 'A contract is a compact between two or more persons, and is either executory or executed. An executory contract is one, in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert the right. A party is always estopped by his own grant. 'This language,' says Mr. Justice Story, 'is perfectly unambiguous, and was used in reference to a grant of land by a governor of a state, under a legislative act. It determines in the most unequivocal manner, that the grant of a state is a contract within the clause of the constitution now in question; and that it implies a contract not to reassume the rights granted. *A fortiori* the doctrine applies to a charter or grant from the king.

Upon this question, it was contended for the defendant, and so decided in the Superior Court of New Hampshire, that the word 'contract' must be taken in a limited sense; that the clause was not intended to limit the power of the states, in relation to their own public officers and servants, or to their own civil institutions, and must not be construed to embrace contracts, which are in their nature, mere matters of civil institution; nor grants of power and authority, by a state to individuals, to be exercised for purposes merely public. Thus marriage is a contract; but being a matter of civil institution, is not within the meaning of this clause. A law, therefore, authorizing divorces, although it impairs the validity of marriage contracts, is not a violation of the constitution of the United States. The trustees have no private interest in the property of this institution, nothing that can be sold or transferred, that can descend to their heirs, or be assets in the hands of these administrators, the beneficial interest being

in the state; and those contracts alone, the parties to which, have a vested, beneficial interest are protected by this clause of the constitution.

To this, it was replied, that the framers of the constitution did not intend to restrain the states, in the regulations of their civil institutions, adopted for internal government; that this provision of the constitution never had been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights, which may be asserted in a court of justice. It never has, says Chief Justice Marshall, been understood to restrict the general right of the legislature, to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any state legislature shall pass an act, annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

Dr. Wheelock, continues the Chief Justice, acting for himself, and for those, who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something, in their opinion, of inestimable value; for something, which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken

distributively, are imperceptible, amount collectively to a most important interest. Those are in the aggregate to be exercised, asserted, and protected by the corporation.

Mr. Mason, in his argument, maintains, that the trustees have legal rights, both in their corporate and individual capacities. To this corporate capacity, they claim the franchise of being, and continuing to be, a corporation, and a right to possess and enjoy all the privileges granted and assured to them, by their charter; and, among others, the right to the property acquired under it. In their individual capacities, they claim the right to be members of the corporation, and to enjoy all the privileges accruing to them, from being members,

This being a private corporation, the trustees have legal rights and interests, which cannot be taken away or infringed, at the discretion of the legislature. The rights of private corporations are entitled to the same protection, as the rights of individuals. A corporation is created for the purpose of securing and perpetuating rights.

It cannot, says Mr. Webster, be necessary to say much in refutation of the idea, that there cannot be a legal interest or ownership in any thing, which does not yield a pecuniary profit; as if the law regarded no rights, but the rights of money and of visible tangible property. Of what nature are all rights of suffrage? No elector has a particular personal interest; but each has a legal right, to be exercised at his own discretion, and it cannot be taken away from him.

The several arguments, urged for the defendant, were met and answered in detail by Mr. Justice Story, in the elaborate opinion delivered by him. In respect to *corporate franchises*, says the Judge, they are, properly speaking, legal estates vested in the corporation itself, as soon as it is in esse. They are not mere naked powers, granted to the corporation, but powers coupled with an interest. The property of the corporation rests upon the possession of its franchises; and whatever may be thought as to the corporators, it cannot be denied, that the corporation itself has a legal interest in them.

'The franchises granted by the charter were vested in the trustees, in their corporate character. The lands and other property subsequently acquired were held by them in the same manner. They were the private demesnes of the corporation, held by it, not as the argument supposes, for the use and

benefit of the people of New Hampshire, but as the charter itself declares "for the use of Dartmouth College."'

There are other rights and privileges belonging to the trustees, collectively and severally, which are deserving of notice. They are entrusted with the exclusive power to manage the funds, to choose the officers, and to regulate the corporate concerns, according to their own discretion. The *jus patronatûs* is vested in them. The visitatorial power, in its most enlarged extent, also belongs to them. When this power devolves upon the founder of a charity, it is an hereditament, descendible in perpetuity to his heirs, and in default of heirs, it escheats to the government. It is a valuable right founded in property, as much so as the right of patronage in any other case.

Speaking of the rights, interests, and franchises, of the trustees. under their charter, the Chief Justice remarks, 'this is plainly a contract, to which the donors, the trustees, and the crown, to whose rights and obligations, New Hampshire succeeds, were the original parties. It is a contract made on a valuable consideration. It is a contract made for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation.'

It was therefore determined that this was a contract, the obligation of which could not be impaired without violating the constitution of the United States.

2. The only remaining question is, do the acts of the New Hampshire legislature impair its obligation? To dispose of this point, we have only to quote the concluding remarks of Chief Justice Marshall, in the opinion delivered by him, setting forth, with great clearness, the facts and reasonings which support it.

'From the review of this charter, which has been taken, it appears, that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated, that this corporation, thus constituted, should continue for ever; and that the number of trustees should for ever consist of twelve and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.'

'By the revolution, the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted that among the latter, was comprehended the transcendant power of parliament, as well as that of the executive department. It is too clear, to require the support of argument, that all contracts and rights respecting property, remained unchanged by the revolution. The obligations then, which were created by the charter to Dartmouth College, were the same in the new, that they had been in the old government. The power of the government was also the same. A repeal of this charter, at any time prior to the adoption of the present constitution of the United States, would have been an extraordinary and unprecedented act of power, but one, which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the state. But the constitution of the United States has imposed this additional limitation, that the legislature of a state shall pass no act "impairing the obligation of contracts."

'It appears that the act, "to amend the charter and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty one, gives the appointment of the additional number to the executive of the state, and creates a board of overseers to consist of twenty five persons, of whom, twenty one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

'On the effect of this law, two opinions cannot be entertained. Between acting directly, and through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees, named in the charter, and empowered to perpetuate themselves, are placed by this act, under the control of the government of the state. The will of the state is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted not merely, for the perpetual application of the funds which they gave to the objects, for which those funds were given; they contracted also to secure the

application of them by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 no longer exists. It is reorganized, and reorganized in such a manner, as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men into a machine entirely subservient to the government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

'In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors, and founders, for the benefit of religion and literature. Yet, it is not clear, that the trustees ought to be considered as destitute of such beneficial interest in themselves, as the law may respect.' After some further remarks, showing such interest, the chief justice concludes, 'but the court has deemed it unnecessary to investigate this particular point, being of opinion on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights, which are protected by the constitution.'

We have thus attempted to give a summary view of the course of argument, in this important case. We wished to give an intelligible view of the great questions, upon which the cause turned; and keeping ourselves within those limits, we have been compelled to omit all notice of many subsidiary arguments. We have also omitted to notice the numerous authorities quoted and commented upon, selecting or condensing indiscriminately such statements and arguments as appeared best adapted to our purpose, and were sanctioned by the court.

We are very sensible, that no adequate conception can be formed of the powerful manner, in which this cause was argued by the counsel for the plaintiffs. The gentlemen engaged in it, had long been trained in the habits of forensic dis-

cussion; and deeply feeling their responsibility to their clients and to the public, they brought to their task all that ever makes men eloquent or convincing. Reasoning and authority seemed to be exhausted, and the cause of Dartmouth College, and of all literary corporations, appeared to be fixed immoveably on both.

In the opinions of the judges, formed with great caution, and after mature deliberation, embracing the wide extent of the arguments on both sides, every question was argued and determined with admirable fullness and precision.

Probably the only authority, bearing upon this case, which escaped the researches of the counsel and court, is contained in a book, entitled, Notes of Opinions and Judgments, delivered in different Courts by the Right Honourable Sir John Earldly Wilmot, Knt. The cause was heard before the Lord Chancellor Camden, assisted by Sir Thomas Sewall, Master of the Rolls, and Lord Chief Justice Wilmot.

The case came before the court, upon an information brought by the attorney general against Lady Downing, to have an execution of the trusts of the will of Sir George Douning, and the facts were these:

Sir George Downing seized of an equitable estate in fee, and having relations, by his will 20th December, 1717, devised all his manors, messuages, lands, &c. to five trustees and their heirs, to the use of his nephews and other relations, and their issue male in strict settlement; and for default of such issue, he directed that his trustees should buy a piece of ground in Cambridge, and build a college upon it, to be called Downing College; and that a charter royal should be sued for and obtained for the founding of such college, &c. and immediately after such foundation, he directed that his trustees should stand seized in trust for such collegiate body and their successors forever.

All the trustees died in the life time of Sir George, and the devise to them became a lapsed devise.

The devisees named in the will, all died without issue male, and the information was brought at the relation of the chancellor, masters, and scholars of the University of Cambridge, against the devisee and heir at law of Sir Jacob Downing, who was heir at law of Sir George Downing, &c.

The defendant, Lady Downing, the devisee of Sir Jacob Downing, who was the heir of Sir George Downing, insisted

by her answer, that she was entitled to the inheritance of the estates, devised by the will of Sir George Downing, and that the trusts for founding and endowing a college were void.

Three questions were made :

1st. Whether the trusts are illegal and void.

2d. If not illegal and void, whether they are of such a nature, as that a Court of Equity, under the particular circumstances of this case, ought to aid and assist them, or leave them where they lie, or at least not interpose till a college is incorporated, and a license to take in mortmain is obtained.

3d. Supposing the trusts illegal and void, or of such a nature as not fit to be carried in execution by a Court of Equity, whether this court will apply the estate to some other charity *ejusdem generis*, and as near the testator's intention as the rules of law and equity will permit.

After a full discussion of all these points, the three judges declared their unanimous opinion, that the trusts of the charity in question, ought to be carried into execution, after obtaining a charter, &c.

We make the following extracts from the opinion of Chief Justice Wilmot, as containing the liberal sentiments of a wise man.

'A gift for the advancement of useful learning is the most meritorious charity that can be given. Most charities terminate with the individuals, who are the objects of them. But donations of this kind are benefactions to the whole community. They furnish the means of bringing great parts, and natural abilities out into public service, and thereby become a charity not only to the persons, who are so helped forward in their education, but to the whole society, which reaps the benefits of those parts and abilities in the several stations in life, where providence places and employs them; and as Coke in arguing Porter's case, says, "no time was ever so barbarous as to take away erudition and science."'

All people have at all times, thought it most meritorious to promote and encourage them. Even Omar, who directed the Alexandrian Library to be burnt, did not wage war against useful learning, but thought, if the learning contained in those books did not agree with the alcoran, it was noxious; and if it did, it was useless.

It has been observed, that it is an ostentatious attempt to perpetuate the testator's name.

Wishes of this kind often influence the wisest and best of men. There is nothing immoral in yielding to such a motive, if it was the sole and only motive of such a disposition. It is a passion implanted in the mind, as a laudable incentive to industry, and the reward promised Abraham for his faith, 'I will make thy name great among the nations.'

Certain of the devisees are to change their names, but that circumstance will not affect the validity of the devise, and why should that circumstance be more disgustful in one case than in the other. To raise and establish a family in the testator's name and blood, was his first object: natural affection was the principal of that provision. To perpetuate his name by the medium of a college for the good of mankind, was his next object; social affection was the principle of that provision.

Admit that vanity had some share in both dispositions; it loses all its malignant qualities when it is productive of good. And in Popham, 139, ascribing charitable gifts to vain glory and ostentation, is said to tend to a public wrong, because it deters and discourages them; and perhaps the world owes some of the noblest and greatest benefactions, to this motive acting in a thousand shapes and forms. It is a spring not to be checked and stopped up; because under the direction of good laws, it becomes an inexhaustible source of benefits to mankind.*

We have already alluded to an attempt upon the charter of Yale College, made in the year 1763, by the General Assembly of Connecticut. At that time, the Rev. Thomas Clap was president of the college, and in a rare and valuable pamphlet, called 'the Annals, or History of Yale College in New Haven, in the Colony of Connecticut, from the founding thereof in the year 1700, to the year 1766,' he gives a brief statement of the case. This pamphlet, we believe, had not been found, at the time the cause of Dartmouth College was argued, although we perceive it is noticed in the appendix to the report.

It appears that in May 1763, nine gentlemen preferred a memorial to the honourable the General Assembly in Connecticut, wherein they represented that the General Assem-

* Downing College at Cambridge has of late years been built. It is a college for the study of the law.

bly *were the founders of the college;* and as such, had a right to appoint visitors, *to reform abuses if any were found, &c. &c.*

Jared Ingersoll and Samuel W. Johnson appeared as counsel for the memorialists, and alleged that the General Assembly *founded* the college, by giving a charter in the year 1701, which contained a donation of about sixty pounds sterling, to be annually paid out of the public treasury, &c. and that the then present assembly, as successors to the founders, had a right of visitation by the common law.

President Clap, who appears to have been master of his cause, placed it upon its true principles. He maintained, that the General Assembly were not, by the grant of the charter, or by subsequent donations, the founders or visitors in the sense of the common law; but that the first trustees who, two years before, had associated themselves, and made and received donations were; that the right of visitation arose in law from the interest which the founder had in the college or hospital by his donation; that the first donation *only* creates the founder, and that all subsequent donations are presumed in law to be given, upon the same end and design with the first, unless some particular limitation be expressly made.

The same principles were maintained and many of the books cited, which were discussed and settled in the case of Dartmouth College; and we have noticed it, not so much as a pertinent authority, as for the purpose of paying our tribute of respect to the memory of a man, who alone, ably and successfully defended the rights of his college against a powerful party in the legislature of the state, aided by the most eminent lawyers of their time.

Doctor Trumbull, the venerable historian of Connecticut, thus concludes his remarks on this subject: 'the memorialists, and their whole party were greatly disappointed and chagrined, and the president got much honour by the defence which he made of the college. He appeared to be a man of extensive knowledge and real greatness. In points of law, especially as they respected colleges, he appeared to be superior to all the lawyers, so that his antagonists acknowledged that he knew more and was wiser than all of them. The question relative to the assembly's being the founders of the college, and having a right of visitation has never been publicly discussed since, and it is believed that it never will be again.'

The law in relation to charitable foundations was drawn into discussion in England, at the time of its full examination here, in the case of Dartmouth College. In the year 1816, a motion was made in the House of Commons, by Mr. Brougham, for the appointment of a committee, afterwards called the education committee, 'to inquire into the education of the lower orders of the metropolis, &c. and to consider what might be fit to be done, with respect to the children of paupers, who should be found begging in the streets in and near the metropolis.' This committee, of which Mr. Brougham was chairman, pursued their labours during the session of parliament, and at the conclusion of the session published a report, in which they recommended a parliamentary commission, as the most economical mode of bringing to light the numerous cases of abuse, which they presumed to exist. In 1818, the same committee were reappointed and immediately after, prepared a bill for the nomination of such parliamentary commission.*

The committee appointed in 1816 had extended their inquiries to the great national schools, such as Westminster, the Charter House, Winchester, Eaton, &c. summoned and examined the masters, the statutes of the founders, on the implied or assumed ground, that these were charities connected with the education of the poor. The bill sanctioned and embraced the exercise of these powers and enlarged them so far, as to give to these commissioners jurisdiction over all the charitable foundations of the kingdom, a right to call before them persons, with the deeds and muniments of the property held by them in trust, and upon refusal to commit them to prison, there to be detained without bail or mainprize.

This bill, containing these unlimited powers, passed the House of Commons, without much examination of its details. The report of the committee had been published, setting forth many perversions and abuses of these charities; and the bill seems to have passed, under a state of popular excitement, favourable to its proposed objects. But when the bill came into the House of Lords, Lord Eldon remarked, that there were 'numerous and splendid charities, founded by munificent donors; and *cujus est dare ejus est dispenerì;* and such charities ought only to be under the *domesticum forum* of the visi-

* See letter to Sir William Scott.

tors nominated by the founders, and courts of law ought to have nothing to do with them, unless they abused their trust; and he would resist to the utmost all legislative interference with their duties, and should be glad to know, where was the power of Parliament to interfere in such cases.'

This bill, however, entitled 'an act for appointing commissioners to inquire concerning charities in England for the education of the poor' passed the House of Lords, with the following restrictions. *Sec.* 12. That none of the provisions herein contained shall be construed, to extend to either of the Universities of Oxford or Cambridge; nor to any college or hall within the same, nor to any schools or other endowment of which the said universities, colleges, or halls, are trustees, nor to the colleges of Westminster, Eton, or Winchester, or to the Charter House, or to the schools of Harrow or Rugby, or any of them, nor to any cathedral or collegiate church within England, nor to *any college, free school, or other charitable institution for the purposes of education, which have special visitors, governors, or overseers appointed by their founders.*' This provision is almost literally a transcript of the second and third sections of the statute of charitable uses. 43 Eliz. ch. IV.

In June 1819, the bill, thus restricted, came before the House of Commons, and Mr. Brougham moved to amend it, by striking out the clause 'exempting colleges—free schools or other foundations having special visitors.'

Sir William Scott opposed the amendment, on the ground that the will of the founder, whether provident or not in the choice of visitors, as well as the plan of a charity, should not be interfered with. The House divided—for the amendment 75, against it 107, and so the amendment of Mr. Brougham was rejected by a majority of 82.

This subject has undergone much discussion in England during the last two years; and several pamphlets have been written, in relation to the evidence of the particular abuses, detailed in the report of the committee. With these we have nothing to do; our concern is with the law; and the examination of this, has been much more full and extensive in this country than in England. The Edinburgh and Quarterly Reviews have engaged in the controversy, in the customary form of attack and defence of the ministry; but little can be found in either, touching its legal merits. The most temperate and best reasoned pamphlet, that we have seen, is the

Letter to Sir William Scott. This writer, in answer to the complaint, that there is no remedy for these charitable abuses, after noticing the provisions of the 43 Eliz. and the proceedings under it, remarks: 'But the 52 of George III, *c.* 101, is a still easier remedy, and of so little cost and difficulty, that any charity, however inconsiderable, may have recourse to its powers. In this last statute, the alleged imperfection in the statute of Elizabeth, that of its not extending to charities specially visited, as far as relates to the abuse of the funds, is substantially supplied. Under the 52 George III the parties complaining of any abuse of the funds of the charity have little more to do than to petition. All the proceedings are exempted from stamp duties. The remoteness of the place where the charity is established adds nothing to the expense. The ordinary delays of the Court of Chancery do not occur in a proceeding under this act.'

Admitting, however, the perversions and abuses complained of, and also the insufficiency of the existing remedies, sensible men at a distance, would be likely to say, *provide others which are legal.*

The jurisdiction, which the Supreme Court of the United States has asserted in the case of Dartmouth College and its final judgment therein, by which the acts of a state legislature have been declared unconstitutional and void, and the judgment of its highest tribunal reversed, is pregnant with important results. In cases of this sort, where this court is called upon to discharge those high duties assigned it by the constitution, their proceedings are always regarded with deep interest; for it not only ascertains and determines its own powers, original and appellate, but it extends its inquiries to the acts and doings of states, and marks out and bounds their constitutional sovereignty. As the ultimate expounders of the constitution it confines the legislative powers of congress within their just limits, and in more than one instance has declared its acts void.

According to the theory of our constitution, government is a trust, emanating from the people, and to be exercised for their benefit. The constitution of the United States was adopted by them, and the partition of powers made by it, between the general and state governments, was declared to be for the purpose of forming a more perfect union, of establishing justice, of insuring domestic tranquillity, and of providing for the general defence.

It provides for the organization of three co-ordinate departments, and to each, assigns certain enumerated powers. It declares, that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as congress may, from time to time, establish; that this power shall extend to all cases, in law or equity, arising under the constitution, the laws of the United States, &c. And that the constitution and law of the United States, made pursuant to it, shall be the supreme law of the land.

In prescribing limits to the powers of the states, it declares, among other things, that no state shall enter into any treaty, &c. grant letters of marque or reprisal; coin money, emit bills of credit; make any thing but gold and silver a tender in payment of debts; pass any bills of attainder, or *ex post facto* law, or law impairing the obligation of contracts.

Much reliance was placed upon the security, which the due exercise of the judicial power would afford, to the rights of states, as well of individuals, when infringed or invaded by the encroaching spirit of legislative bodies, either in the states or in Congress. In short, the judicial power was regarded by the friends of a new and better order of things, as a being, separated from the prejudices, the passions, and the interests of men, watching and regulating the movements of a complex system, and wholly intent upon the impartial administration of justice.

In what may be called its foreign jurisdiction, great powers are committed to it, involving great national interests. It is here, that it takes cognizance of cases arising under treaties, such as affect ambassadors, public ministers, and consuls, and cases of admiralty and maritime jurisdiction; and in the discharge of these high functions, it becomes associated with the enlightened jurists of all countries, in expounding and applying the principles of public law.

In its domestic administration it was considered as affording the best protection against the injustice of rival parties, or the violence of popular passions; and where, we now ask, could such a power be lodged, with more safety to the citizens or to the states, and with a better assurance of its honest exercise?

The Judges of the Supreme Court, it is presumed, are always to be selected from among the most eminent men in the profession of the law; and it is to be presumed, also, that

every such man will always feel the just pride of the professional character. He will know, that his judgments must not only be made public, but the reasons and authorities upon which they are founded; and that no gross departure from the law can ever be made, in any case, without exposure, and the immediate expression of public feeling and opinion. Laws, it is true, may be enacted, which are inexpedient, or mischievous, or injurious to private rights, or against common right; because legislative bodies generally act upon the whole body of the people, often under the influence of popular excitement, and always without that feeling of individual responsibility, which dwells in the breast of the judge, who acts upon a few, in the presence of all. Every man, too, in the community, has an interest in the decision of every other man's cause. The rule in one case is to be the rule in all, and sympathy and interest unite all. The violation of a rule of law, in a single case, communicates a shock, like the electric spark, through the whole chain of common rights and interests. A judge, therefore, who should be without a due sense of character, would still stand in some awe of that tribunal, whose sense of right cannot be outraged without the most appalling punishment. No parts, however splendid, no learning, however profound, ever did, or can save, a corrupt or unjust judge, from the never dying disgrace of having perverted the law, to the ruin of an innocent man. The indignant sense of mankind marks him with merited scorn, while he lives, and loads his memory with infamy when he is dead. The history of Jeffries and even of Bacon, the 'greatest, wisest, meanest of mankind,' is enough to keep most judges decently within the rules of law.

Another security arises from the circumstance, that the Judges of the Supreme Court are selected from places and states remote from each other. Local interests or passions, which diffuse an influence within their own limits, of which all, more or less partake, are lost or neutralized in the communion with men who have never been within the infected region. It is not perhaps in human nature, that a local tribunal, however honest in its purpose, should be entirely unmoved by the strong passions which surround it; or that its judgment should be wholly uninfluenced in deciding the very cases which had excited them. But when these cases come before the Supreme Court of the United States, it may be

presumed, that there will always be a majority free from any such bias.

Notwithstanding all these precautions, we are aware it may be said, that as party or faction is the offspring of our institutions, and always the heir apparent to the throne, men *may be* selected for this high office, *because* they are known to be devoted to a great political party, and are ready to become the willing instruments of its ambition or its vengeance; and that no species of oppression is so hopeless or so terrible, as that which may be practised under the forms of justice. This is a truth of fearful import, and the only answer, we can make is, that wisdom and foresight, aided by experience, having exhausted their means, in providing for our safety, if these possible evils do come, they must be left like all extreme cases to provide for themselves.

In reviewing that class of judgments of the Supreme Court, by which constitutional law has been settled, we find a considerable number, founded like the one before us, upon that prohibitory clause of the constitution, which declares that no state shall pass any law impairing the obligation of contracts.

In the year 1795, the state of Georgia granted, in the form of a bill passed by the legislature, a large tract of land to James Gunn and others; and the next year the legislature passed another act, by which they declared that the act of 1795, and all grants, rights, claims, &c. derived therefrom were null and void. In the year 1810, the case of 'Fletcher *vs.* Peck,' came before the Supreme Court, in which the validity of this last act of the Georgia legislature was drawn in question. And the court decided that the law of 1795 was a contract, that absolute rights had vested under it, and that the law of 1796 was unconstitutional, because it 'impaired its obligation.'

In the year 1812 was decided the case of 'New Jersey *vs.* Wilson.' In this case it appeared that the state of New Jersey had, before the revolution, made a grant of certain lands, with the special immunity or privilege that they should for ever remain free from taxation. In the year 1804 the legislature of New Jersey passed an act, repealing the former act, which had exempted the lands in question; and the court determined that such repealing act was unconstitutional because it 'impaired the obligation of contracts.'

In the case of 'Terret *vs.* Taylor' the court in an elaborate opinion held, that a legislative grant was not revocable, and that property held by certain persons for the use of the church, could not be divested by an act of the legislature of the state where the lands were situate; and in 'Pawlet *vs.* Clark' it was also held, that where lands were granted by the state, to the town in which they were situate, for the use and support of religious worship, the legislature could not, by a subsequent act, appropriate the same lands, for the use of the schools of such towns.

In the case of 'Sturges *vs.* Crowninshield,' recently decided, it was determined that an act of the legislature of New York, passed in 1811, so far as it went to discharge a contract, was within the prohibitory clause; and that a state had authority to pass a bankrupt law, provided it did not impair the obligation of contracts, and there was no law of Congress in force establishing a uniform system of bankruptcy.

The reasons of this prohibitory clause in the constitution, and the immense importance of it cannot be better set forth than in the remarks of Chief Justice Marshall, as reported in the case of 'Fletcher *vs.* Peck.' 'Whatever respect might have been felt for the state sovereignties it is not to be disguised that the framers of the constitution viewed, with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the contitution of the United States contains what may be deemed *a bill of rights for the people of each state.*'

There is another class of judgments of the Supreme Court, calling in question the exercise of the legislative power by Congress, and several cases are reported wherein they have decided that Congress have, in the business of legislation, passed the constitutional limits, and that their acts were void.

In the year 1792, an act passed directing the Secretary at War to place on the pension list such disabled officers and soldiers, as should be reported to him *by the Circuit Courts.* This act, so far as it imposed this duty on the Cir-

cuit Courts, was determined to be repugnant to the constitution, and was afterwards repealed.

In the case of 'Marbury *vs.* Madison,' decided in the Supreme Court in the year 1803, a rule was moved to shew cause why a *mandamus*, should not issue, commanding James Madison then Secretary of State, to cause to be delivered to the plaintiffs respectively, their several commissions as justices of the peace in the district of Columbia.

The court determined that they had no power to issue a *mandamus* in the case, it being an exercise of original jurisdiction not warranted by the constitution; and that Congress had no power to give original jurisdiction to the Supreme Court in other cases than those described in the constitution. It is there declared that the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. The act, therefore, of Congress, to establish the judicial courts of the United States, and authorising the Supreme Court to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States, was declared to be unconstitutional and void.

It is quite obvious, that in the allotment of powers to the different departments of the government, little else could be done, than to mark out their great divisions. All that the framers of the constitution attempted to do, was to construct a map, which should exhibit the great boundary lines, leaving the smaller divisions and subdivisions to be drawn, as the cases should arise, which might demand such explanations. It followed of course, that as the powers granted were general, they carried with them an immense mass of implied and incidental powers, with such limitations only, as a fair and reasonable construction would impose. In the legislative department, for example, it first becomes the duty of Congress to exercise its discretion in the enactment of such laws, as are deemed necessary and proper to carry into effect the powers granted; and if they, at any time, aim at objects not within the scope of those powers, or by means and instruments not fairly derived from them, it then becomes the duty of the Supreme Court to interpose its correcting power, to keep them within their prescribed sphere of action. In the selection of means, and in their adaptation to the ends propos-

ed, in executing the powers conferred by the constitution, a sound discretion is to be used; but, as in the chances and changes which await all political institutions, this discretion may be abused, an ultimate revising power is given to the Supreme Court. Such is the theory of our constitution, and such is the security provided by it against the abuse of the legislative power. At the same time, it is no less a part of this theory, that the legislative power of Congress, acting within its constitutional limits is and must be sovereign and supreme. In all cases where Congress have a right by the constitution to legislate, their acts must be uninfluenced and uncontrolled by the conflicting rights of the states. This is equally true of the judicial department. In the exercise of its granted powers, of its original and appellate jurisdiction it is ultimate and supreme; at the same time, it is equally bound to respect the rights and jurisdiction of the state tribunals. All this results from the supremacy of the constitution. As it was the work of all, it acts upon all, for the benefit of all, and its action must not be obstructed by a part.

It will always be in the power of a state, or of its citizens, to bring to the test, every doubtful exercise of the power of Congress. Cases of this sort have already occurred. The state of Maryland imposed a tax upon the branch of the United States' bank established there, and the case came before the Supreme Court. The first question was whether Congress had the power to incorporate a bank, and in the discussion of it, the incidental and derivative powers of Congress, the choice of means, and their adaptation to the ends proposed were fully examined, and the court determined that the creation of a banking corporation, was a proper and fit instrument for carrying on the fiscal operations of the government. Many examples of incidental powers were stated. The power given by the constitution to establish post offices and post roads was one. This power was executed by the single act of making the establishment. But from this power has been inferred, the power and duty of carrying the mail along the post road, and from one post office to another. And from this implied power, has again been inferred a right to punish those who steal letters from the post office, or rob the mail. The second question was, whether the state of Maryland could, without violating the constitution, tax the branch estab-

lished there. In the discussion of this question, the concurrent and conflicting rights of states were explored and their just limits ascertained. The court having determined, that Congress had the power to erect a bank, and this power being necessarily supreme, it followed that a power to create, implied a power to preserve; the unlimited power of a state to tax was a power to destroy; and the exercise of such a power being inconsistent with the preserving power, it could not coexist with it, but must yield to that power, which was in its nature, sovereign and supreme.

Every decision of this sort imparts something of solidity and durability to our constitution. It embodies abstract principles and gives them a local habitation and a name. A principle, however important, or even fundamental is not always clearly discerned, by the great mass of men, or if it is, retains no firm hold upon the mind; it may be perplexed, or darkened, or overthrown by ingenious sophistry; but a judgment of the highest tribunal whose right and duty it is to expound the constitution, connected as it usually is with interesting facts, is remembered, and exerts a salutary influence upon the public mind, even when the reasons on which it is founded are forgotten.

The state of Ohio has not chosen to submit to this opinion of the Supreme Court; but has proceeded by legislative and judicial acts, to lay and collect a tax upon the branch of the United States' bank established there. The government of the United States will proceed by its civil officers and process to act upon persons and parties, and it will remain with the state of Ohio to suffer the law to take its course, or to put itself in array against the government of the Union. If the last alternative is chosen, the question will then assume a new aspect, and must be decided like any other controversy between sovereign states.

An attempt to impede the execution of the civil process of the United States Court, was made in the year 1808 by the state of Pennsylvania. The case came before the Supreme Court upon motion for a *mandamus* to the district judge of Pennsylvania, directing him to execute the sentence pronounced by him in the case of 'Gideon Olmstead and others *vs.* Rittenhouse's executrixes,' or to show cause for not so doing. The cause shown by the district judge in his return, was an act of the legislature of Pennsylvania passed subse-

quent to the rendition of his sentence. This act authorised and required the governor to demand for the use of the state, the money which had been decreed to Gideon Olmstead and others, to direct a suit to be instituted for its recovery, and to use such further means as he should think necessary to protect the just rights of the state, &c. &c. A military force was ordered out, a peremptory *mandamus* was awarded by the Supreme Court, and the sentence of the District Court was peaceably executed.

In the execution of powers granted, or presumed to have been granted to the executive department, cases will arise requiring the final judgment of the Supreme Court, to confine this department also within its lawful limits. One case of this kind has already occurred. The proclamation of the president of the United States, restoring the non-intercourse acts upon the failure of the arrangement made with Mr. Erskine, was declared by the court to be illegal and void.

Another case arose during the late war with Great Britain, which brought in question the right of the executive department to decide upon the existence of those emergencies, upon the happening of which, the militia of a state might be employed in the service of the United States. The constitution vested in the Congress the power to provide for calling forth the militia, *to execute the laws of the Union*, to *suppress insurrections*, and repel invasions. The president of the United States, claimed the power to decide the fact in relation to either of these emergencies, pursuant to an act of Congress passed 28th February, 1795. The Supreme Court of Massachusetts, whose opinion had been required by the executive of the state, determined that this power was not given, either to Congress or the president, but was vested in the commanders in chief of the militia of the several states. The militia were withheld by the governor of the state, and nothing afterwards occurred to bring the case within the jurisdiction of the Supreme Court of the United States.

We are aware of popular impressions in relation to this case, and we also know that they are dangerous expounders of constitutional law. At present, it is enough for us to say, that whenever this question comes judicially before the Supreme Court of the United States, it may be determined in the same way it has been; and if not, the consequences resulting to the people of the United States may be of such a

nature as to unite them in providing the only proper remedy, an amendment of the constitution.

One case has arisen which drew in question the appellate power of the Supreme Court, and this case arose in the state of Virginia. The Court of Appeals, the highest tribunal of the state, in the case of 'Martin *vs.* Hunters, Lessee,' determined that the appellate power of the Supreme Court of the United States, did not extend to that court under a sound construction of the constitution; and that the judiciary act, which gave appellate jurisdiction to the Supreme Court was repugnant to the constitution. This opinion of the Court of Appeals was reviewed on a writ of Error, and finally reversed by the Supreme Court.

Our limits have only permitted us to indicate a few of the topics of discussion, in relation to the subject of constitutional law, and to notice some of the most important judgments of the court. This part of the law of the land is daily becoming more interesting, and exerting a wider influence upon the affairs of our country, from the respect that is generally felt for judicial decisions, from the intelligible form in which principles are exhibited, and from the gradual formation of a body of constitutional exposition, which will furnish precedents and analogies to future times. Within the last twenty years, we have seen the judicial department protecting the rights of the citizens of a state against the injustice of their own legislatures, and keeping within their constitutional bounds the legislative and executive powers of the union; and, through the disastrous changes that await all free governments, it may be found to be the strongest barrier against the tide of popular commotions, or the usurping spirit of popular assemblies. In the divisions which political opinions, or territorial lines and interests may make upon the great map of the empire, every good man would wish that the law should be supreme over all. While justice is allowed to do her work, uncorrupted and unobstructed, the ignorant prejudices, the local interests and passions of the day may mix, and ferment, and explode, without danger to our civil state. It is our just pride, that we have attempted a mode of government, which divests itself of all the support, which is derived from the honest weaknesses and attachments of the human mind; which, disclaiming all alliance with reverence for ancient authority, or the deep rooted habits of unthinking obedience, trusts itself, with no

other attractions than its own moral worth and dignity, to the custody of our virtues. By subjecting legislative bodies to rule, and holding them under the restraints of those fundamental principles and enactments, which we call the constitution, we have given a new dignity and higher duty to LAW, and realised the noble idea of a moral supremacy, clothed with power, to hold not only subjects of the government to a just performance of their various individual duties, but also the government itself, in all its departments, in its proper place and sphere.

In the brighter moments of our hopes for the future fortunes of our country, we are ready to exclaim with Sir William Jones:

> What constitutes a state?
> Not high raised battlement or laboured mound,
> Thick wall or moated gate;
> Not cities proud, with spires and turrets crown'd;
> Not bays and broad armed ports,
> Where, laughing at the storm, rich navies ride,
> Not starr'd and spangled courts,
> Where low brow'd baseness wafts perfume to pride.
> No! Men, high minded men,
> With powers as far above dull brutes endued,
> In forest, brake, or den,
> As beasts excel cold rocks and brambles rude;
> Men, who their duties know,
> But know their rights, and knowing, dare maintain,
> Prevent the long aimed blow,
> And crush the tyrant while they rend the chain:
> These constitute a state,
> And sovereign law, that state's collected will,
> O'er thrones and globes elate,
> Sits empress, crowning good, repressing ill, &c.

We may be told that this is the *beau ideal* of government, the vision of a perfect commonwealth; and so it is:—still the hopes of patriots and sages, amid discouragement and defeat, gather about and rest upon it, with something of that gladness of heart, which the tired traveller feels, when he first descries the sun lights upon the distant towers of the happy valley.

Although the dangers of American liberty arise and press upon us from every side, to chastise our hopes and our confidence, the duty of its true friends is not doubtful. They

must labour to augment that moral force, to which its very existence is committed; and if their efforts are unavailing here, they may address those who are doomed to witness its decline and fall in the language of Hector,

Si pergama dextra
Defendi possent, etiam hâc defensa fuissent.

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ART. VII.—*Proceedings and Report of the Commissioners for the University of Virginia, presented 8th of December* 1818. Richmond, printed by Thomas Ritchie, 8vo, pp. 34, 1818.

THE Literary Fund of Virginia was stated, in an official report of the board of trustees, to amount, on the 1st of December 1818, to $1,114,159. The same report states that the annual income of the Fund, when it shall have been increased by the sums still due from the United States to Virginia, on account of monies advanced for military service in the late war, and by fines, forfeitures, escheats, and lotteries, will probably amount to $90,000 per annum. Nothing in the United States except a similar fund in Connecticut, which amounts, we believe, to between thirteen or fourteen hundred thousand dollars, can be compared to this splendid public dotation of literature.

By an act of the Assembly of Virginia, about two years ago, an act which we have not had the advantage of seeing, the income of this large fund was appropriated to the establishment of schools for the education of the poor, according to an apportionment among the various counties of the state, and to assist the foundation of the University of Virginia. We believe that the greater part of the income of the fund was appropriated to the *former* of these purposes. It is to the same purpose that the greater part of the Connecticut fund is also appropriated. We can conceive of circumstances, particularly in Virginia, which may make such public patronage of primary schools for the education of the poor, desirable and even necessary. But inasmuch as this primary education is procured at little expense, and is of such obvious and indispensable necessity that parents, even of narrow and illiberal minds, are commonly willing to furnish it to their children, we cannot but think that such primary schools may better be